



# Department of Justice

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STATEMENT OF

ATTORNEY GENERAL

WILLIAM B. SAXBE

ON

NATIONAL SECURITY ELECTRONIC SURVEILLANCE

AND

S. 2820

BEFORE THE

SUBCOMMITTEE ON CRIMINAL

LAWS AND PROCEDURES

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

**DOJ REVIEW COMPLETED**

OCTOBER 2, 1974

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE, I AM PLEASED TO APPEAR HERE TODAY TO EXPRESS THE VIEWS AND CONCERNS OF THE DEPARTMENT OF JUSTICE REGARDING NATIONAL SECURITY ELECTRONIC SURVEILLANCE AND S. 2820, AS AMENDED, PROPOSED LEGISLATION SEEKING TO ESTABLISH NATIONAL SECURITY ELECTRONIC SURVEILLANCE PRACTICES AND PROCEDURES.

WITH ME TODAY IS ASSISTANT ATTORNEY GENERAL HENRY E. PETERSEN, HEAD OF THE DEPARTMENT'S CRIMINAL DIVISION, WHO HAS BEEN DEEPLY INVOLVED FOR THE PAST ONE AND ONE HALF YEARS IN THE SUPERVISION OF THE DEPARTMENT'S RESPONSIBILITIES IN THE AREA OF NATIONAL SECURITY ELECTRONIC SURVEILLANCE. WE WILL, OF COURSE, BE HAPPY TO RESPOND, AS COMPLETELY AS IS POSSIBLE, TO ANY QUESTIONS THAT YOU OR THE MEMBERS OF THE SUBCOMMITTEE MAY HAVE.

WHILE MY REMARKS WILL COVER THE SUBJECT OF NATIONAL SECURITY WIRETAPPING AND ELECTRONIC SURVEILLANCE, I WANT TO MAKE VERY CLEAR AT THE OUTSET MY VIEWS REGARDING TITLE III OF THE "OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968." AS ATTORNEY GENERAL, BASED ON MY REVIEW OF OUR EXPERIENCE WITH TITLE III OVER THE PAST FIVE AND ONE HALF YEARS, I BELIEVE THAT ITS PROVISIONS HAVE VASTLY IMPROVED OUR LAW ENFORCEMENT EFFORT AND AT THE SAME TIME FURNISHED MORE PROTECTION THAN EVER BEFORE TO THE PRIVACY OF OUR CITIZENS. TITLE III WORKS WELL -- AND I WOULD HOPE THAT CONGRESS WOULD NOT AMEND IT IN ANY WAY AT THIS TIME.

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I WOULD NOW LIKE TO COMMENT BRIEFLY ON S. 2820, AS AMENDED ON FEBRUARY 4, 1974.

THE BILL WOULD AMEND THE EXISTING LAW BY REQUIRING THAT ELECTRONIC SURVEILLANCE IN ALL NATIONAL SECURITY CASES, INCLUDING THOSE INVOLVING FOREIGN INTELLIGENCE OPERATIVES, BE UNDERTAKEN ONLY WHEN AUTHORIZED BY A COURT ORDER BASED ON SPECIFIED PROBABLE CAUSE CRITERIA.

IT IS THE DEPARTMENT'S POSITION THAT THE PRESIDENT, ACTING THROUGH THE ATTORNEY GENERAL, MAY CONSTITUTIONALLY AUTHORIZE ELECTRONIC SURVEILLANCE TO GATHER INFORMATION TO PROTECT THE NATION AGAINST ACTUAL OR POTENTIAL ATTACK OR OTHER HOSTILE ACTS OF A FOREIGN POWER, TO OBTAIN FOREIGN INTELLIGENCE INFORMATION VITAL TO THE SECURITY OF THE UNITED STATES, OR TO PROTECT NATIONAL SECURITY INFORMATION AGAINST FOREIGN INTELLIGENCE ACTIVITIES. TITLE 18, U.S.C., SECTION 2511(3) SPECIFICALLY DISAVOWS ANY LIMITATION ON THE CONSTITUTIONAL POWER OF THE PRESIDENT IN NATIONAL SECURITY MATTERS INVOLVING FOREIGN POWERS.

EVERY FEDERAL COURT, WITHOUT EXCEPTION, IN WHICH THE MATTER HAS BEEN CONSIDERED HAS UPHELD THE DEPARTMENT'S CONTENTION THAT SUCH ELECTRONIC SUREVEILLANCES ARE LAWFUL WHEN THE POWER OF THE PRESIDENT IN FOREIGN INTELLIGENCE MATTERS IS INVOLVED.

S. 2820 WOULD TAKE FROM THE PRESIDENT POWERS THAT ALWAYS HAVE BEEN EXCLUSIVELY HIS, AND BY REQUIRING A COURT ORDER FOR ELECTRONIC SURVEILLANCE IN NATIONAL SECURITY CASES, WOULD GRANT THAT POWER TO THE JUDICIARY. AT PRESENT, A DECISION IS MADE TO USE ELECTRONIC SURVEILLANCE IN NATIONAL SECURITY CASES ONLY AFTER CLOSE EXAMINATION OF A BROAD SPECTRUM OF INFORMATION, MUCH OF WHICH IS DERIVED FROM SENSITIVE SOURCES AND WHICH INVOLVES MATTERS THAT MUST BE KEPT SECRET. IN SUCH CASES, IT WOULD BE VIRTUALLY IMPOSSIBLE TO CONVEY THIS INFORMATION TO A COURT AND TO ISOLATE THE FACTOR UPON WHICH A DECISION TO EMPLOY SUCH SURVEILLANCE WOULD BE BASED.

THE SENSITIVITY OF THE INTELLIGENCE IN THESE CASES CANNOT POSSIBLY BE EVALUATED BY PERSONS WHO DO NOT REGULARLY DEAL WITH FOREIGN AFFAIRS AND INTELLIGENCE MATTERS. THE JUDGMENT REQUIRES CONSIDERATION OF INFORMATION THAT CANNOT BE AVAILABLE TO THE JUDICIARY. FURTHERMORE, THE NEED TO ACQUIRE ESSENTIAL FOREIGN INTELLIGENCE AND DIPLOMATIC INFORMATION IS URGENT AND IMMEDIATE IN SUCH MATTERS AS THE CUBAN MISSILE CRISIS OR THE OUTBREAK OF HOSTILITIES IN THE MIDDLE EAST. TO COMPLY WITH THE DETAILED REQUIREMENTS OF THE BILL IN SUCH SITUATIONS WOULD GRIEVOUSLY HAMPER OUR ABILITY TO ACQUIRE CRUCIAL INFORMATION IMMEDIATELY.

IN ADDITION TO OUR STRONG OPPOSITION TO THE GENERAL CONCEPT OF THE BILL, WE OBJECT TO SECTION 4(c) WHICH LIMITS THE USE OF

EVIDENCE OBTAINED BY ELECTRONIC SURVEILLANCE, EVEN WHEN DULY AUTHORIZED BY A COURT ORDER, TO CIVIL PROCEEDINGS AGAINST FOREIGN AGENTS. WE DO NOT UNDERSTAND THE REASON FOR PRECLUDING THE USE OF SUCH EVIDENCE IN CRIMINAL TRIALS.

*Final of 25 days* THE BILL WOULD ALSO PERMIT A JUDGE TO AUTHORIZE AN INTERCEPTION FOR A PERIOD OF ONLY 15 DAYS, WITH AN EXTENSION, AFTER A NEW APPLICATION, FOR NO MORE THAN 10 DAYS. AT PRESENT, TITLE 18, U.S.C., SECTION 2518 PERMITS JUDICIAL AUTHORIZATION OF INTERCEPTIONS IN CRIMINAL CASES FOR 30 DAY PERIODS, WITH EXTENSIONS OF 30 DAYS. NO REASON HAS BEEN GIVEN TO JUSTIFY A SHORTER PERIOD IN NATIONAL SECURITY CASES, AND, IN OUR OPINION, NONE CAN BE GIVEN.

THE DEFINITION OF A FOREIGN AGENT AS CONTAINED IN THE BILL IS LIKEWISE UNSATISFACTORY. A FOREIGN AGENT IS DEFINED AS A PERSON WHO IS NEITHER AN AMERICAN CITIZEN NOR IN THE PROCESS OF BECOMING ONE. HIS FIRST ALLEGIANCE IS TO A FOREIGN POWER AND HIS ACTIVITIES ARE INTENDED TO SERVE THE INTEREST OF THAT FOREIGN POWER, AND TO UNDERMINE THE SECURITY OF THE UNITED STATES. IT EXCLUDES ALL AMERICAN CITIZENS FROM ITS PROVISIONS, EVEN IF THEY ARE SERVING THE INTERESTS OF A FOREIGN POWER. IT ALSO EXCLUDES SUCH PERSONS AS FOREIGN COMMERCIAL OR MILITARY ATTACHES, WHO, WHILE THEY MAY BE CARRYING ON ACTIVITIES THAT ARE NOT SPECIFICALLY AIMED AT UNDERMINING THE SECURITY OF THE UNITED STATES, ARE SERVING THE INTEREST OF A FOREIGN POWER. ACCORDINGLY,

WE FEEL THE DEFINITION OF A "FOREIGN AGENT" IN THE BILL IS ENTIRELY TOO RESTRICTIVE.

MR. CHAIRMAN, THE DEPARTMENT OF JUSTICE OPPOSES THIS LEGISLATION, BUT I UNDERSTAND THE CONCERNS THAT HAVE FATHERED IT. I WOULD NOW LIKE TO ADDRESS THOSE CONCERNS THAT SPRING FROM WATERGATE. THAT IS, ARE DEPARTMENT PROCEDURES IN NATIONAL SECURITY ELECTRONIC SURVEILLANCES SUFFICIENT TO PROTECT AGAINST ABUSE? MY ANSWER IS AN EMPHATIC YES. PUT ANOTHER WAY, THE QUESTION IS THIS: BECAUSE OF SOME APPARENT ABUSES, SHOULD THE PRESIDENT BE DENIED THE POWER TO AUTHORIZE A NATIONAL SECURITY SURVEILLANCE THAT IS ABSOLUTELY ESSENTIAL?

MY ANSWER IS AN EMPHATIC NO.

THE NECESSITY FOR SUCH SURVEILLANCE HAS BEEN RECOGNIZED BY EVERY PRESIDENT, ATTORNEY GENERAL, AND FEDERAL COURT THAT HAS CONSIDERED THE QUESTION, SINCE 1940. INDEED, CONGRESS HAS RECOGNIZED ITS NECESSITY IN TITLE III.

AS I SAID, I AM AWARE OF THE WORRY ABOUT THE WAY THE PRESIDENT'S INHERENT CONSTITUTIONAL AUTHORITY TO UNDERTAKE NATIONAL SECURITY ELECTRONIC SURVEILLANCES HAS BEEN USED IN RECENT YEARS. WATERGATE HAS INTENSIFIED PUBLIC DEBATE OF THIS SUBJECT. SINCE BECOMING ATTORNEY GENERAL, I HAVE PUBLICLY AND STRONGLY STATED MY VIEWS ABOUT WATERGATE AND IMPROPER ELECTRONIC SURVEILLANCE. HOWEVER, AS CONCERNED AS I REMAIN ABOUT THE ABUSES OF WATERGATE, I FEAR THAT WE MIGHT OVERREACT AND UNDULY TIE THE PRESIDENT'S HANDS IN LEGITIMATE NATIONAL

SECURITY AREAS. WE SHOULD NOT LET THE PASSIONS OF THE MOMENT BLIND US TO THE CONTINUING REQUIREMENTS OF NATIONAL SECURITY. NOR SHOULD WE USE PAST ABUSES OF THE POWER OF THE PRESIDENCY TO JUSTIFY IMPROPER STEPS -- UNCONSTITUTIONAL STEPS -- THAT WOULD STRIP AWAY FOR THE FUTURE THE LEGITIMATE AND NECESSARY AUTHORITY OF THE CHIEF EXECUTIVE.

YOU ARE CONCERNED; I AM CONCERNED. AND SO ARE ALL THOSE IN THE DEPARTMENT OF JUSTICE WHO HAVE A PART IN THE DECISION-MAKING PROCESS IN THIS AREA. STRICT CONTROLS ARE, OF COURSE, ABSOLUTELY ESSENTIAL TO THE PROPER USE OF THIS SURVEILLANCE. I HAVE USED AND WILL CONTINUE TO USE THIS AUTHORITY IN A CAREFULLY CONTROLLED AND CIRCUMSCRIBED MANNER.

LET ME BRIEFLY DISCUSS THE PROCEDURES USED IN THE DEPARTMENT TO OBTAIN APPROVAL TO INSTALL A NATIONAL SECURITY ELECTRONIC SURVEILLANCE.

FIRST OF ALL, FOR A REQUEST FOR A FOREIGN INTELLIGENCE SURVEILLANCE TO SURVIVE, IT MUST FIRST BE APPROVED BY SEVERAL DIFFERENT LEVELS OF SUPERVISION WITHIN THE FBI BEFORE IT EVEN REACHES THE DIRECTOR'S OFFICE, AND THE REQUEST MUST CONTAIN VERY DETAILED INFORMATION.

IF THE REQUEST ORIGINATES IN AN FBI FIELD OFFICE, THE PROPOSAL WILL BE CONSIDERED BY THE CASE AGENT, THE SUPERVISOR, AND THE SPECIAL AGENT IN CHARGE OF THE FIELD OFFICE. AT FBI HEADQUARTERS THE REQUEST WILL BE CONSIDERED BY THE SUPERVISORY SPECIAL AGENT, THE UNIT CHIEF, THE SECTION CHIEF, THE BRANCH CHIEF, THE ASSISTANT DIRECTOR, THE DEPUTY ASSOCIATE DIRECTOR, AND THE ASSOCIATE DIRECTOR BEFORE IT REACHES THE DIRECTOR

FOR HIS APPROVAL.

IF THE DIRECTOR APPROVES THE REQUEST, IT IS THEN SENT TO THE ASSISTANT ATTORNEY GENERAL IN CHARGE OF THE CRIMINAL DIVISION, MR. PETERSEN. HE THEN FORWARDS THE REQUEST WITH HIS RECOMMENDATION AND COMMENTS FOR MY CONSIDERATION. IF, AND ONLY IF, I APPROVE THE REQUEST CAN THE SURVEILLANCE BE INSTALLED AND THEN FOR A MAXIMUM PERIOD OF THREE MONTHS, AFTER WHICH I WILL APPROVE A RENEWAL ONLY WITH WHAT I DEEM SUFFICIENT JUSTIFICATION. LET ME ASSURE YOU THAT I DO NOT APPROVE THESE AUTOMATICALLY.

NUMEROUS REQUESTS ARE TURNED DOWN LONG BEFORE THEY REACH MY DESK. I PERSONALLY HAVE WITHHELD SOME AUTHORIZATIONS AND ON AT LEAST ONE OCCASION I HAVE DENIED A REQUEST FOR AN EXTENSION.

THE POWER TO AUTHORIZE ANY SURVEILLANCE IS NECESSARILY DISCRETIONARY, AND WHERE THERE IS DISCRETION, THERE IS A POTENTIAL FOR ABUSE. WHILE INDIVIDUALS MAY DIFFER ON CERTAIN CASES, WE THINK THE PUBLIC RECORD IS SUFFICIENTLY CLEAR THAT THERE HAS BEEN NO SERIOUS ABUSE OF DISCRETION OVER THE YEARS OF NATIONAL SECURITY WIRETAPS INSTALLED FOR FOREIGN INTELLIGENCE PURPOSES.

PRESIDENT FORD ANNOUNCED EARLY IN THIS ADMINISTRATION THAT HE WOULD NOT TOLERATE ANY ILLEGAL ELECTRONIC SURVEILLANCE. I REAFFIRM THE PRESIDENT'S PLEDGE. I FAVOR CONTINUING THE POLICIES AND PROCEDURES THAT WE NOW FOLLOW TO HAVE ALL



NATIONAL SECURITY ELECTRONIC SURVEILLANCES APPROVED BY THE ATTORNEY GENERAL AND TO HAVE VIGOROUS, PERIODIC CONGRESSIONAL INQUIRY INTO THESE POLICIES AND PROCEDURES.

IN MY VIEW, THE SENSITIVE EXERCISE OF THIS POWER SHOULD BE LIMITED TO AS FEW PEOPLE AS POSSIBLE SO AS TO ENSURE STRICT ACCOUNTABILITY. TODAY, I AM THE ONLY ONE WHO AUTHORIZES SUCH SURVEILLANCES. I PLEDGE TO YOU I WILL NOT ABUSE THIS POWER, FOR ANY PURPOSE OR FOR ANY PERSON, NO MATTER WHO HE MAY BE.

IN EXERCISING THIS POWER IN THE PAST, I HAVE DONE SO VERY CAUTIOUSLY. I WILL CONTINUE TO USE SUCH RESTRAINT IN THE FUTURE.